(3)

No. 84-1176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,
v.

PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,
OCCIDENTAL CHEMICAL CORPORATION and
THE BROOKLYN UNION GAS COMPANY,
Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

ROBERT L. BAUM
Counsel of Record
EDWARD H. COMER
WILLIAM L. FANG
JAMES H. BYRD
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

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On Appeal from the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court (the Court), the Edison Electric Institute (EEI) respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

INTEREST OF EDISON ELECTRIC INSTITUTE

The Edison Electric Institute (EEI) is the association of the nation's investor-owned electric utility companies. Its members serve 96 percent of all customers of the

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[1] While the other parties have consented to the filing of the attached brief *amicus curiae*, Appellees Public Service Commission of New York and Brooklyn Union Gas Co. have not consented to EEI's participation. The letters providing consent have been filed with the Clerk of the Court.

investor-owned segment of the electric utility industry and 73 percent of the nation's electricity users.

EEI's members are subject to the provisions of section 210 of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3 (1982), which requires the Federal Energy Regulatory Commission (FERC) to prescribe rules requiring electric utilities to offer to purchase the electricity produced by qualifying cogeneration and small power production facilities.[2] Section 210(b) of PURPA, 16 U.S.C. § 824a-3(b) (1982), provides that the rates set by FERC's rules "shall be just and reasonable to the electric consumers of the electric utility and in the public interest," "shall not discriminate against" qualifying facilities and shall not "exceed[] the incremental cost to the electric utility of alternative electric energy." FERC has implemented this provision by promulgating rules requiring utilities to purchase electricity from a qualifying facility at a rate equal to the utility's full avoided cost, 18 C.F.R. §§ 292.101(b)(6), 292.303(a), 292.304 (1984), a term which is the equivalent of the phrase "incremental cost of alternative electric energy" as defined in section 210(d) of PURPA, 16 U.S.C. § 824a-3(d) (1982). In *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), this Court upheld the validity of FERC's full avoided cost rule. However, it emphasized that full

[2] The statute defines a "cogeneration facility" as a facility that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A) (1982). A "small power production facility" is one that has a production capacity of not more than 80 megawatts and produces electric power from biomass, waste, renewable resources (such as wind, water or solar energy), or geothermal resources. 16 U.S.C. § 796(17)(A) (1982). A "qualifying cogeneration facility" or a "qualifying small power production facility" is one that, *inter alia*, meets requirements established by FERC. 16 U.S.C. §§ 796(17)(C), (18)(B) (1982). These facilities shall hereinafter be jointly referred to as "qualifying facilities."

avoided cost is "the maximum rate that the Commission may prescribe." *Id.* at 413.

Section 210(f) of PURPA, 16 U.S.C. § 824a-3(f) (1982), requires each state regulatory authority to implement the rules FERC issues pursuant to section 210(a) of PURPA. In *Fed. Energy Regulatory Comm'n* v. *Mississippi*, 456 U.S. 742, 751 (1982), this Court noted that under FERC rules a state regulatory authority may comply by issuing regulations, resolving disputes on a case-by-case basis or taking other actions reasonably designed to give effect to FERC's rules. See 18 C.F.R. § 292.401(a) (1984).

Notwithstanding the clear language of section 210(b) of PURPA and the FERC regulations implementing that section (18 C.F.R. § 292.101 *et seq.*), the New York Public Service Commission (Commission), acting pursuant to state law, has established rates for purchases of electricity from qualifying facilities which are higher than Appellant's avoided cost. The New York Court of Appeals—the highest appellate court in that state—has upheld the Commission's decision. *Consolidated Edison Co. of New York, Inc.* v. *Pub. Serv. Comm'n*, 472 N.E.2d 981, 63 N.Y.2d 424 (N.Y. 1984); App. 1a-15a. Consequently, Appellant and its customers, as well as other utilities in New York and their ratepayers, are faced with the prospect of purchasing electricity from qualifying facilities at costs which exceed each utility's own avoided cost. The cost of these electricity purchases will ultimately be recovered in the rates at which utilities sell electricity to their customers. As a result, the consuming public in New York is harmed inasmuch as it must pay electricity rates that are based upon costs higher than the maximum level Congress established in section 210 of PURPA.

The decision of the New York Court of Appeals from which this appeal is taken is likely to encourage qualifying facilities and their representatives to seek to obtain sim-

ilar results in other states throughout the nation. This would require states, through their regulatory authorities, courts and legislatures, to reconsider individually the preemption question presented in this case. Adoption of the position of the New York Court of Appeals by other states would cause electric utilities and their customers in those states to pay rates based on costs higher than the maximum cost intended by Congress for purchases of electric energy from qualifying facilitie.

As a national association, EEI is in a position to reflect the impact of the issue in this case from a broader perspective than the parties herein. The attached brief *amicus curiae* demonstrates that the question arising in the instant case is substantial with respect to its implications for states, state regulatory authorities, utilities and ratepayers throughout the nation, as well as on its own merits, so as to warrant the Court noting probable jurisdiction.

CONCLUSION

For the reasons set forth above and in the attached brief, EEI urges this Court to grant its motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

ROBERT L. BAUM
Counsel of Record

EDWARD H. COMER
WILLIAM L. FANG
JAMES H. BYRD
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

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QUESTION PRESENTED

Whether section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) preempts the states from requiring electric utilities to pay a rate higher than the maximum rate specified in PURPA for purchases of electric energy from qualifying cogeneration and small power production facilities.

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Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Edison Electric Institute (EEI) hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed by Consolidated Edison Company of New York, Inc. (Appellant) on January 18, 1985. Appellant seeks the United States Supreme Court's (the Court) review of the final judgment of the Court of Appeals of the State of New York requiring electric utilities (including Appellant) to pay more for purchases of electric energy from qualifying cogeneration and small power production facilities than the maximum rate specified in section 210(b) of the Public Utility Regulatory Policies Act of 1978

(PURPA or Act), 16 U.S.C. § 824a-3(b) (1982). *Consolidated Edison Co. of New York, Inc.* v. *Pub. Serv. Comm'n*, 472 N.E.2d 981, 63 N.Y.2d 424 (N.Y. 1984); App. 1a-15a.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the national association of investor-owned electric companies. Its members serve 96 percent of all customers of the investor-owned utility industry and 73 percent of the nation's electricity users. EEI's member companies are governed by the provisions of section 210 of PURPA, 16 U.S.C. § 824a-3 (1982), as implemented by the states pursuant to section 210(f) of the Act, 16 U.S.C. § 824a-3(f) (1982).[1]

As discussed in the foregoing Motion for Leave to File, section 210 requires the Federal Energy Regulatory Commission (FERC) to prescribe rules which compel electric utilities to purchase electric energy generated by qualifying cogeneration and qualifying small power production facilities (collectively referred to as "qualifying facilities") at rates which do not exceed the incremental cost to the electric utility of alternative electric energy. 16 U.S.C. §§ 824a-3(a), (b) (1982).[2] FERC has promulgated rules which require a utility to purchase electricity from qualifying facilities at a rate equal to the utility's full avoided cost. 18 C.F.R. §§ 292.101(b)(6), 292.303(a), 292.304 (1984). The term "avoided cost" is equivalent to the phrase "incremental cost of alternative electric energy" as defined in section 210(d) of PURPA, 16 U.S.C. § 824a-3(d) (1982).

[1] This brief assumes, without addressing, the constitutionality of section 210's mandatory purchase requirement, at any given rate, in order to provide proper focus to the preemption issue in this case.

[2] As indicated in note 2 to the appended Motion, the terms "qualifying cogeneration facility" and "qualifying small power production facility" refer to facilities as defined in 16 U.S.C. §§ 796(17)(A), (18)(B) (1982) and which meet requirements established by FERC.

In two decisions, *Fed. Energy Regulatory Comm'n* v. *Mississippi*, 456 U.S. 742 (1982), and *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), this Court upheld FERC's full avoided cost rule and PURPA's requirement that each state implement the FERC-promulgated regulations. In so doing, this Court specifically stated that full avoided cost is "the maximum rate that the Commission may prescribe." *American Paper Institute, supra*, 461 U.S. at 413. However, the New York Public Service Commission, acting pursuant to section 66-c(1) of the New York Public Service Law, established a rate for utility purchases of electric energy from qualifying facilities that *exceeds* avoided cost and is thus higher than the maximum level Congress established for such transactions in section 210 of PURPA. As discussed in the foregoing Motion for Leave to File, this decision concerns an issue vital to EEI, its members and their customers.

SUMMARY OF ARGUMENT

This brief *amicus curiae* demonstrates the importance of the preemption issue in this case. It surveys the state laws, regulatory authority decisions and court decisions which address the proper level of rates for electric utility purchases from qualifying facilities and focuses on those which specifically address the preemption issue. States, largely acting through state regulatory authorities, have generally adopted the full avoided cost standard in setting rates for such transactions, as required by section 210 of PURPA. However, at least two state laws in addition to the New York law at issue in this case impose rates above avoided cost for some transactions. Moreover, some of the state regulatory authorities which claim to implement the avoided cost standard have stated their belief that section 210 of PURPA does not preempt them from establishing rates which exceed avoided cost.

In state courts, a clear conflict regarding the preemption issue exists between the decision of the New York Court of Appeals for which review is sought and a decision of the Supreme Court of Kansas. *Kansas City Power & Light Co.* v. *State Corp. Comm'n*, 234 Kan. 1052, 676 P.2d 764 (1984). The preemption issue is also being litigated in at least two other state courts, and has been presented before FERC, which declined to consider the matter. Since states periodically reconsider the proper rate for utility purchases of electricity from qualifying facilities, substantial opportunity exists for representatives of qualifying facilities to encourage other states to adopt the approach sanctioned by the New York Court of Appeals. If other states accept this view, additional litigation on the preemption issue will surely follow.

Review of this case by this Court is necessary to assure a uniform interpretation of section 210 of PURPA throughout the nation. Review will also promote judicial and administrative economy by precluding the need for additional state courts and state regulatory authorities to address the preemption issue. Finally, review by this Court is necessary to effectuate the requirement of section 210(f) of PURPA that states "implement" the rules FERC prescribes under section 210. Preemption must be found since FERC rules prescribed pursuant to section 210 establish avoided cost as the maximum level for rates for utility purchases from qualifying facilities, and it is impossible for a state to comply with this requirement if it simultaneously imposes a rate which is above avoided cost. This result is also necessary to implement Congress' delicate balancing of the interests of qualifying facilities with those of electric utility customers. A finding of preemption will protect these customers from subsidizing qualifying facilities through their electricity rates to a greater extent than Congress authorized in section 210 of PURPA.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THE DECISION BELOW RAISES AN ISSUE OF FEDERAL PREEMPTION SUBJECT TO RECURRING CONSIDERATION BY STATES THROUGHOUT THE NATION.

A. The Proper Level Of Rates For Purchases From Qualifying Facilities Is A Recurring Issue Of Broad National Interest.

The decision below addresses an issue of federal preemption important to states, state regulatory agencies, electric utilities and ratepayers throughout the nation. The implementation of section 210 of PURPA, together with other federal laws,[3] has succeeded in encouraging the development of qualifying facilities. FERC reports that over 1,000 applicants, representing approximately 15,000 megawatts of electric production capacity, have filed under its certification procedures for qualifying facility status. Fed. Energy Regulatory Comm'n, *Quarterly Report on Qualifying Small Power Production and Cogeneration Facility Filings* at i (July 1, 1984). While not every qualifying facility certified by FERC has begun operation, experience indicates that the majority will become operational.

Many states have adopted legislation intended to promote cogeneration and small power production. See, *e.g.*, Conn. Gen. Stat. Ann. § 16-243a (1982); Fla. Stat. Ann. § 366.05(9) (West 1984 Supp.); N.C. Gen. Stat. § 62-156 (1982). Many states also have conducted rulemaking or similar proceedings which are intended to implement the avoided cost requirements of section 210 of PURPA and 18 C.F.R. Part 292 of FERC's regulations. See, *e.g.*, *In re Cogenerators and Small Power Producers*, 51 PUR 4th 369 (Ark. P.S.C. 1983); *In re Consideration of Co-*

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[3] See, *e.g.*, the Energy Tax Act of 1978, § 301(b), 26 U.S.C. § 48(*l*) (1982).

generation Standards Pursuant to the Public Utility Regulatory Policies Act of 1978, Case Nos. 9,999-10,001 (N.D. P.S.C. Mar. 30, 1981); *In re Adopting Chapter 480-105 WAC Relating to Electric Companies*, Cause No. U-80-105, Gen. Order No. R-160 (Wash. U.T.C. Jan. 28, 1981).

States, particularly state regulatory authorities, periodically reconsider issues regarding electric utility purchases from qualifying facilities, including the appropriate level of rates for such purchases. This occurs in part because a utility's avoided cost fluctuates over time with changes in the cost of energy and production facilities necessary to generate electricity.[4] In addition, states monitor whether new developments require modifications in policy. This process provides the opportunity for representatives of qualifying facilities to assert that, and for the states to consider whether, the decision of the New York Court of Appeals allowing rates which exceed avoided cost should be followed.

B. The States Have Inconsistent Views As To Whether Section 210 Of PURPA Preempts States From Establishing Rates Above Avoided Cost For Purchases From Qualifying Facilities.

To date, laws, regulatory authority decisions and court decisions in the states have developed conflicting views as to whether section 210 of PURPA preempts states from establishing rates above avoided cost for electric utility purchases of electricity from qualifying facilities. While the majority of states have implemented the

[4] Avoided cost changes in response to changes in the need for new capacity and the cost of fuels. The declining cost of fuels, such as oil and natural gas in recent times, often tends to reduce avoided cost. Over the short term, avoided cost is higher during peak demand periods when electricity is more expensive to produce than during periods of lower demand when the least-cost facilities and fuels are used.

avoided cost standard, a few have established some rates above avoided cost. The following discussion identifies relevant state court decisions, state laws and state regulatory authority decisions which reveal the diversity of views regarding, and the importance of, the issue in this case.

The Kansas Supreme Court has issued an opinion that conflicts directly with the New York decision at issue in this case. The court held that the Kansas State Corporation Commission is preempted by section 210 of PURPA and by the FERC regulations from establishing a rate for purchases from qualifying facilities which exceeds avoided cost. *Kansas City Power & Light Co.* v. *State Corp. Comm'n*, 234 Kan. 1052, 676 P.2d 764 (1984).[5]

The Oregon Public Utility Commissioner recently made the same determination after considering the requirements of section 210 of PURPA and this Court's decision in *American Paper Institute*. The Commissioner stated, "While utilities are required to purchase the output of a qualifying facility at full avoided costs, states cannot require utilities to pay higher than full avoided costs." *In re Investigation of Avoided Costs and of Cost-effective Fuel Use and Resource Development*, 62 PUR 4th 397, 400 (Or. P.U.C. 1984). This decision explicitly relied upon the Kansas Supreme Court decision as well as the lower New York court decision, *Consolidated Edison Co. of New York, Inc.* v. *Pub. Serv. Comm'n*, 98 A.D.2d 377, 471 N.Y.S.2d 684 (N.Y. App. Div. 1983); App. 16a-26a,

[5] Orders which the Kansas State Corporation Commission issued subsequent to this decision addressing rates for electric utility purchases from qualifying facilities are being challenged in state court as, *inter alia*, an unconstitutional taking of private property which is contrary to due process of law. *Kansas City Power & Light Co.* v. *State Corp. Comm'n*, No. 84C67 (Kan. D. Ct. filed Oct. 15, 1984).

that was reversed by the New York Court of Appeals decision, review of which is now being sought.

States other than New York have passed laws which could be interpreted to allow rates above avoided cost in at least some circumstances. This problem occurs most often when a minimum purchase rate is established which is insensitive to situations where avoided cost is below that rate. Connecticut, for example, requires electric utilities to purchase electricity generated by a "resources recovery facility . . . owned by or operated by or for the benefit of a municipality" at "the same rate that the company charges the municipality . . . for electricity." Conn. Gen. Stat. § 16-243e (1985). In every instance, the rate for electricity to Connecticut municipalities would exceed the avoided cost of the affected Connecticut utilities. The Connecticut Department of Public Utility Control had concluded that PURPA "leaves the states free to enact laws or regulations providing for even greater encouragement of self-generators than contained in [those rules]. Only state laws or regulations which would provide rates lower than the federal standards must yield to the federal law." *Connecticut Light and Power Co.*, 41 PUR 4th 1, 41 (Conn. D.P.U.C. 1980).

Minnesota specifically allows a qualifying facility smaller than 40 kilowatts to sell electricity at avoided cost, or the "average retail utility energy rate" for sales to that class of customer, whichever is higher. Minn. Stat. Ann. §§ 216B.164(3)(b), (c) (West Supp. 1984).[6]

In other states which have enacted legislation that could be interpreted to permit rates above avoided cost,[7] state regulatory authorities have implemented these laws

[6] EEI is not aware of any transactions which have been completed under these provisions of Connecticut and Minnesota law.

[7] *See* Ind. Code Ann. §§ 8-1-2.4-4(b), (c) (Burns 1982); Iowa Code § 476.43 (West 1984-85 Supp.); Mont. Code Ann. § 69-3-604(4) (1983); Vt. Stat. Ann. tit. 30, § 209(a)(8) (1984 Supp.).

in a manner which they claim restrains rates at the avoided cost level.[8] For example, the Public Service Commission of Indiana recently stated:

> The U.S. Supreme Court in *American Paper Institute, Inc. v. American Electric Power Service Corporation* . . . decided that the Federal Energy Regulatory Commission has the authority to adopt a rule requiring electric utilities to purchase electric energy from cogenerators at a rate equal to the purchasing utility's *full* avoided cost. The rule developed by the Staff of the Commission being considered for approval in the proceeding is an attempt to comply with the legislative intent of [the Indiana statute] within the "avoided cost" concept. . . .

Indiana Rules, *supra*, slip op. at 2 (citation omitted and emphasis in the original). Litigation is currently pending in Indiana and Iowa state courts which addresses, *inter alia*, whether rates established by those state regulatory authorities improperly exceed avoided cost because of errors in the determination of those costs. *Indiana & Michigan Electric Co.* v. *Pub. Serv. Comm'n of Indiana*, No. 2-1084A326 (Ct. App. Ind. filed Oct. 29, 1984); *Iowa Power and Light Co.* v. *Iowa State Commerce Comm'n*, Case No. AA-677 (Iowa D. Ct. filed Sept. 14, 1984). The parties bringing these cases expressly challenge each state action on the grounds that states are preempted by PURPA from establishing rates which exceed avoided cost.

[8] *In re Adoption and Promulgation by the Public Service Commission of Indiana of Rules and Regulations with Respect to Cogeneration and Alternate Energy Production Facilities*, Cause No. 37494 (Ind. P.S.C. Oct. 5, 1984) (hereinafter "Indiana Rules"); *In re Alternate Energy Production*, Docket No. RMU-83-30, slip op. at 1 (Iowa S.C.C. July 27, 1984); *In re Investigation into and Refinement of Electric Avoided Cost Based Rates for Public Utility Purchases from Qualifying Cogenerators and Small Power Producers*, Docket No. 83.1.2, Order No. 5017, slip op. at 2 (Mont. P.S.C. Nov. 10, 1983).

The Vermont Public Service Board found that it has the legal authority to impose rates above avoided cost, but claimed it applies the avoided cost standard:

> While federal law does not authorize rates in excess of marginal costs, 16 USC § 824a-3(b), Vermont law, which does not expressly address the issue but which does seek to encourage small power production, may allow it. . . .
>
> Despite the possibility that another course is legally permissible, the examiner in this proceeding has endeavored to recommend rates strictly in accordance with the marginal cost standard. There are sound reasons for the approach.

In re Small Power Production Rates, 60 PUR 4th 148, 150 (Vt. P.S.B. 1984) (citation omitted). However, the regulatory authority in Vermont established a single rate for purchases from qualifying facilities applicable to all utilities in the state. On September 23, 1983, the Vermont Electric Cooperative (VEC) filed a Complaint and Petition for Declaratory Order with FERC which alleged, *inter alia*, that Vermont's state-wide, composite rate exceeds VEC's actual avoided cost and thereby violates section 210 of PURPA. Docket No. EL83-32-000. On November 22, 1983 FERC issued a Notice of Intent Not to Act with respect to this issue and thus, without explanation, declined to resolve the preemption issue as well as the other questions presented by VEC.

To EEI's knowledge, the majority of states which have implemented section 210 of PURPA have attempted to impose rates for purchases from qualifying facilities which do not exceed the avoided cost ceiling imposed by PURPA. Where state legislation could arguably have been interpreted to allow rates either at or above avoided cost, most state regulatory authorities have attempted to adopt the avoided cost standard.

Despite the trend among the states to conform to the federal requirements, the preemption question in this case retains significance throughout the country. This issue is currently being litigated before at least two state courts. Moreover, since the decision of the New York Court of Appeals stands out as the only decision of the highest court of a state which expressly permits a state to impose rates above avoided cost for purchases from qualifying facilities, it will likely cause representatives of qualifying facilities to ask state legislatures and regulatory authorities throughout the nation to adopt rates above avoided cost for such transactions. Thus, state legislatures and regulatory authorities, and ultimately state courts, will be faced with the preemption issue as well.

In view of the direct conflict between the New York decision and that of the Kansas Supreme Court, as well as FERC's inaction on the only complaint which has raised this issue before it, it is important for this Court to resolve this issue now. By so doing it will assure consistent application of section 210 of PURPA and resolve whether electricity consumers may be required to pay rates based upon costs for purchases of electricity from qualifying facilities which exceed the maximum level established by Congress.

II. THE NEW YORK COURT OF APPEALS ERRED SINCE SECTION 210 OF PURPA PREEMPTS THE STATES FROM REQUIRING ELECTRIC UTILITIES TO PAY MORE THAN AVOIDED COST FOR PURCHASES OF ELECTRICITY FROM QUALIFYING FACILITIES.

In *Pacific Gas & Electric Co.* v. *State Energy Resources Comm'n*, 461 U.S. 190, 203-04 (1983), this Court recently summarized the standards used to determine if federal law preempts state action:

> It is well established that within constitutional limits Congress may pre-empt state authority by so

stating in express terms. . . . Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference, that Congress left no room for the state to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

(Citations omitted.)

Section 210(b) of PURPA establishes avoided cost as the maximum rate which FERC may prescribe for electric utility purchases of electricity from qualifying facilities. *American Paper Institute, supra*, 461 U.S. at 413. Section 210(f) of PURPA explicitly requires each state regulatory authority to "implement" the rules FERC prescribes under section 210.[9] EEI submits that the statutory scheme of section 210 contains exactly the language necessary to show congressional intent to preempt state action which establishes rates above avoided cost for purchases from qualifying facilities.

[9] The provisions in 18 C.F.R. § 292.304(a)(2) (1984) contain the same restriction as PURPA section 210(b) that rates shall not exceed avoided cost. Under 18 C.F.R. § 292.403 (1984) state regulatory commissions may obtain a waiver from FERC to apply a rate below avoided cost. *American Paper Institute, supra,* 461 U.S. at 416.

Preemption must be found because of the direct conflict between such state and federal requirements. It is impossible for a utility to satisfy simultaneously a state requirement that the rate for a transaction exceeds avoided cost and the PURPA section 210(b) requirement that avoided cost is the maximum permissible rate for that transaction. Similarly, a state regulatory authority cannot concurrently enforce such a state requirement and comply with the avoided cost maximum rate mandated by section 210(b) of PURPA and adopted by FERC. For these reasons, EEI submits that the provisions of section 210 of PURPA preempt states from imposing rates above avoided cost for electric utility purchases of electricity from qualifying facilities.[10]

This reading of PURPA is necessary to protect the ratepayers of Appellant as well as those of other electric

[10] The court below erred in relying upon FERC's statement in the preamble to its regulations implementing PURPA (45 *Fed. Reg.* 12214, 12221-22 (1980)) that states may exceed the avoided cost ceiling. *See* App. 8a-10a. The FERC statement is not implemented in, and is inconsistent with, the regulations which it accompanies. See, *e.g.*, 18 C.F.R. §§ 292.401, 292.403 (1984). Moreover, the interpretation of an agency charged with the administration of a statute "cannot be sustained if . . . it conflicts with the clear language and legislative history of the statute." *Escondido Mutual Water Co.* v. *La Jolla*, —— U.S. ——, 104 S. Ct. 2105, 2114 n.22 (1984). FERC fails to explain how a state regulatory authority can "implement" the avoided cost ceiling of section 210 when it imposes a higher rate for the very transaction subject to that ceiling. Moreover, FERC ignores legislative history which demonstrates that Congress explicitly rejected a Senate bill, in which the Secretary of Energy would have recommended to state regulatory authorities guidelines for regulating electric utility purchases from qualifying facilities, in favor of the current approach, which requires state regulatory authorities to "implement" the FERC rules regarding such transactions. *Compare* S. Rep. No. 442, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7903, 7915, *with* H. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 97, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831.

utilities across the country. One of the purposes expressed in section 101 of PURPA, 16 U.S.C. § 2611(3) (1982), is to encourage "equitable rates to electric consumers." Section 210(b)(1) of PURPA, 16 U.S.C. § 824a-3(b)(1) (1982), specifically provides that rates for purchasing electric energy from qualifying facilities "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." Congress has thus balanced the national goal of providing incentives to qualifying facilities against the ratepayer interest in paying fair and reasonable rates. This delicate balancing of interests—which already provides a subsidy to qualifying facilities insofar as avoided cost exceeds the production cost of the qualifying facility—would be upset by allowing states to exceed the maximum limit established by Congress. Clearly, the payment of excessive rates to qualifying facilities by utilities was intended to be preempted by the statutory scheme which Congress enacted after much deliberation over these significant national interests.

CONCLUSION

For the foregoing reasons, as well as those expressed by Appellant in its jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted,

ROBERT L. BAUM
Counsel of Record

EDWARD H. COMER
WILLIAM L. FANG
JAMES H. BYRD
EDISON ELECTRIC INSTITUTE
1111 19th Street, N.W.
Washington, D.C. 20036
(202) 828-7679

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